Supreme Court, U.S.
FILED

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IN THE

Supreme Court of the United States

October Term, 1996

THE VILLAGE OF AIRMONT, and its Municipal Officers,
Petitioners,

-against-

RABBI YITZCHOK LEBLANC-STERNBERG, CHANIE LEBLANC-STERNBERG, FRED WALFISH, LEWIS KAMMAN, PARK AVENUE SYNAGOGUE, INC., UNITED STATES OF AMERICA,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED

Did the Court below unconstitutionally (1) violate the doctrine of federalism by directing changes to a zoning code without any evidence that anyone was harmed by the zoning code; (2) direct injunctive relief where there was no wrong to remedy in the case?

PARTIES

The parties are fully stated in the caption of this case.

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OPINION BELOW

This determination by the Court of Appeals for the Second Circuit was rendered by Summary Order on December 6, 1996. The Summary Order provided that the Second Circuit Decision "will not be published in the Federal Reporter and may not be cited as precedential authority." The Summary Order contained the opinion of the Court and is set forth in Exhibit "A". The Summary Order was issued as a mandate on January 22, 1997.

GROUNDS ON WHICH JURISDICTION OF THIS COURT IS INVOKED

In this Petition, Petitioners are municipal officers ("individual Petitioners") and the municipal entity of the Village of Airmont, New York ("Village"). In January 1993 the Village adopted its first zoning code regulating inter alia places of religious worship within the Village. Prior to the Code being adopted by the Village in January 1993, the Respondents initiated litigation against the Village alleging inter alia that the Village and its municipal officers utilized zoning in a religiously discriminatory fashion even though no zoning code existed at that time. Petitioners had adopted a facially neutral zoning code zoning traditional places of worship such as a synagogue or church in residential areas provided a two acre minimum lot size existed. Under the Village's zoning code, variances for religious uses were permitted if the lot size to be used for religious worship was less than two acres. The Village Zoning Code also allowed small groups of individuals gathering for prayer in a residential structure. Individual respondents in this matter are Orthodox Jewish residents of the Village requiring a place of religious worship within walking distance of their residences. The Respondent United States of America ("Government"),

commenced its action against Petitioners under the Fair Housing Act urging that the Village's yet-to-be enacted Zoning Code was unconstitutional.

After a two month trial, the jury dismissed all claims against individual Respondents. The jury, however, found that the Village had violated the individual Respondents rights under the Fair Housing Act and that the Village conspired to violate Respondents' First Amendments rights. But, the jury awarded zero damages. Following the jury verdict, upon application by Petitioners, the District Court dismissed the Government action and granted the Village's application for a judgment as a matter of law dismissing all Respondents' claims. Respondents appealed to the Second Circuit Court of Appeals and by judgment dated September 21, 1995 the Second Circuit reversed the District Court. A Petition for a Writ of Certiorari to the United States Supreme Court was sought and previously denied.

Thereafter, by Decisions dated April 25, 1996 and April 29, 1996 the District Court on remand from the Second Circuit issued injunctive relief as directed though acknowledging that by doing so it was violating Supreme Court precedent. Petitioners again timely appealed to the Second Circuit Court of Appeals and that Court by Summary Order dated December 6, 1996 affirmed the District Court Decision on the remedy imposed. Petitioners now seek a Writ of Certiorari to this Court. The Docket Number in the Court below was 96-6149.

Jurisdiction of the Court of Appeals for the Second Circuit was pursuant to 28 U.S.C. 1295(a)(4)(6)(10) and for this Court is 28 U.S.C. 1254(1).

STATEMENT OF THE CASE

In Rockland County, New York the early 1980's saw a zoning movement taking place. This movement involved

the creation of local governments establishing zoning controls in several newly formed villages. In all of these village movements, the primary focus of village incorporation involved enactment of a local zoning ordinance. Before incorporation of the Village of Airmont ("Village"), the Town of Ramapo within which the Village was located had interpreted the "home professional office" zoning category of its local zoning code as a planning device to accommodate Orthodox Jewish residents needing a place of worship in a residential neighborhood. The Town of Ramapo's own zoning official conceded this "interpretation" was "relatively unique" throughout the entire nation. The home professional office zoning concept was utilized since certain Orthodox Jewish sects did not have funds to purchase a traditionally sized lot to establish a freestanding place of worship within walking distance of their residence.

Orthodox Jewish residents are required to walk to religious services on the Sabbath. To accommodate religious needs, the Village's zoning ordinance permitted places of worship in residential districts provided a minimum two acre lot existed. Although the Village's facially neutral zoning ordinance permitted a place of worship within walking distance from residential lots owned by Orthodox Jewish residents, the Respondent Orthodox Rabbi testified that "economics" prevented purchase of a two acre size lot for a place of worship in the Village. The Village's zoning code, however, did allow for variances to be granted from the two acre lot minimum for those sects who could not acquire the minimum sized lot. Also, the Village's zoning code had not yet been interpreted when Respondents sued to allow a place of worship under the "home professional office" zoning classification as did the Town of Ramapo zoning code.

The record in this case was clear that the Village's zoning code did not prevent any Orthodox Jewish families

from residing within the Village. Likewise, the record is clear that no Orthodox Jewish residents were required to relocate from the Village as a result of its zoning ordinances. And, most significantly no Orthodox Jewish residents were prevented from praying or exercising their religion due to the Village's Zoning Code. In fact, the number of Orthodox Jewish residents in the Village increased dramatically since adoption of the Village's zoning ordinance. Additionally, all of the individual Respondents who practiced the Orthodox Jewish faith conceded under oath at trial that the Village did not violate any right to religious worship.

Although Respondents sued under a Fair Housing Act claim, by self-selection within the Village the residential area occupied by individual Respondents was referred to as a "Torah Community" and was developed by a builder who previously developed "an exclusively Orthodox community." The Second Circuit Court of Appeals, however, did not object to this practice of segregated religious neighborhoods. On the contrary, the Second Circuit required the Village's zoning code to favor the religious practices of Orthodox Jewish residents where such zoning code was otherwise facially neutral in establishing places of worship.

Notwithstanding the uncontroverted facts that not a single Orthodox Jewish Respondent was prevented from attending prayer service or religious worship and that no Orthodox Jewish resident claimed to be harmed by the Village zoning ordinance, the Court of Appeals reversed the District Court's dismissal of the Government's case. The Circuit Court also reversed the District Court's ultimate dismissal of the individual Respondents' claims under the Fair Housing Act and First Amendment.

After the Second Circuit reversed the District Court, the District Court on April 25, 1996 and April 29, 1996 issued two Orders directing certain declaratory and injunctive

relief. A prohibitory injunction was issued by the District Court enjoining the Village from promoting religious discrimination, denying equal protection to those with religious uses and from discriminating in housing or through housing based upon religion. The District Court upon remand also issued with reservations that its action was unconstitutional a mandatory injunction ordering the Village to revise its zoning code to include an as of right use for residential places of worship.

Petitioners timely appealed from the District Court Order to the Second Circuit Court of Appeals. The Second Circuit affirmed the District Court recognizing, however, that the District Court "ordered mandatory injunctive relief grudgingly, arguing that in doing so he was forced to ignore the Supreme Court's recent instruction that injunctive relief in such cases be remedial in nature." Additionally, the Second Circuit curiously determined that because an injunctive measure was prospective "does not imply that it is not remedial." In its Summary Order the Second Circuit rejected "all" arguments raised by the Village as being "without merit." This Petition for a Writ of Certiorari is from the aforementioned Order by the Court of Appeals for the Second Circuit.

I.

THIS PETITION SHOULD BE GRANTED SINCE THE DOCTRINE OF FEDERALISM WAS VIOLATED BY THE COURT BELOW

Throughout our history as a nation, the fundamental principal has existed that powers should not be concentrated in either one branch or government - neither the federal nor state sovereign. In James Madison's words, "The accumulation of all powers, legislative, executive, and

judiciary, in the same hands, whether of one, a few or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny." (The Federalist No. 47 at 301 (James Madison) (Clinton Rossiter Ed. 1961). It is respectfully submitted that the Second Circuit Decision has created a federal tyranny over state and local issues.

Although Madison was referring to the separation of powers within a government, his reasoning is particularly applicable to the separation of powers between state and federal governments. The Second Circuit Decision totally violated principles of federalism in its Summary Order and disregarded considerations of State sovereignty. The District Court itself remarked that because it was constrained by the prior Second Circuit determination of September 1995, the injunctive relief was being provided "despite the Supreme Court's teachings in Rizzo v. Good, 423 U.S. 362, 44 L.Ed. 2nd, 561, 96 S.Ct. 598 (1976)." LeBlanc-Sternberg v. Fletcher, 922 F.Supp. 959, 972, fn.2 (S.D.N.Y.). The District Court also noted that the Second Circuit disregarded considerations of federalism: "Federal courts must be constantly mindful of the 'special delicacy of the adjustment to be preserved between federal equitable powers and state administration of its own laws'." Id. In fact, the Second Circuit Decision from which Certiorari is now sought disregarded clear precedent that the constitution provides for a federal government "of limited powers." New York v. United States, 505 U.S. 144, 155 (1992). Instead, the Second Circuit Summary Order has adopted an interpretation of federal equitable powers that "override all principles of federalism." Gregory v. Ashcroft, 501 U.S. 452, 469 (1991).

For these reasons, the Second Circuit issuance of injunctive relief, that even the District Court realized was wrong, was a jurisprudential failure to realize that its holding

"radically change[d] the whole theory of the relations of the state and federal governments to each other." Slaughter House Cases, 83 U.S. 36, 78 (1873). As a leading commentator noted years ago, our Constitution "is founded on a wholesome and strenuous jealousy, which foreseeing the possibility of mischief, guards with solicitude against any exercise of power which may endanger the States, so far as is practicable." Joseph Story, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES, 957 (5th Ed. 1905). The Second Circuit Order not only endangers state zoning power, it totally vitiates such power.

It bears emphasis that the Second Circuit upheld issuance of an injunctive remedy even though every Respondent admitted that the Village did not interfere with their religious worship whatsoever. Accordingly, Federal Court intervention into local affairs was directed herein without any demonstration that specific harm was sustained by any Respondent as a result of the Village's conduct. Such judicial intervention by the Second Circuit totally disregards "local autonomy" which has been a "vital national tradition" in our nation. Dayton Bd. of Ed. v. Brinkman, 433 U.S. 406, 410 (1977); see also, "Separation of Powers in the Scope of Federal Equitable Remedy," 30 Stan. L. Rev. 661 (1978).

Otherwise stated, the Second Circuit permitted Federal Court intervention into a uniquely local issue such as zoning which resolution is better placed in local governments rather than a Federal Judge. Wright v. City of Emporia, 407 U.S. 451, 477-478 (1972). While the Second Circuit found that it was "likely" the Village may violate constitutional rights by future conduct, this prognostication was not based upon any evidence. Instead, it was "appellate alchemy" recognized by the District Court to enable the Second Circuit to reach its conclusion of resolving an issue of that day. Such appellate practices strip away local municipal power and upset the

division of power between Federal and State sovereigns. See, e.g, Missouri v. Jenkins, ___U.S.___, ___, 115 S Ct. 2038, 2049 and 2056 (1995), citing Freeman v. Pitts, 503 U.S. 467, 489 (1992)(proper structural remedy should restore local autonomy).

By reason of the foregoing, the Second Circuit Court acted unconstitutionally since "the constitution protects us from our own best intentions: It divides power among sovereigns and among branches of government precisely so that we must resist the temptation to concentrate power in one location as an expedient solution to the crisis of the day." New York v. United States, 505 U.S. 144, 187 (1992). The Second Circuit Decision now concentrates zoning power in federal, rather than local or state hands. Therefore, certiorari should be granted by this Court to review that determination by the Second Circuit Court of Appeals herein.

II.
WHERE A REMEDIAL INJUNCTION WAS ISSUED DESPITE THE ABSENCE OF ANY WRONG TO REMEDY THIS COURT SHOULD TAKE CERTIORARI

In this appeal, the Second Circuit considered a record where all Respondents conceded that the Village did not interfere with their right to pray. As such, the individual Respondents have sustained no wrong that could be remedied by an injunction. Yet, the Second Circuit exercised its injunctive powers to uphold a remedial injunction under the guise that it was "prospective" only. Such a judicial exercise is totally without precedent in our jurisprudence and this Court should therefore accept certiorari.

As even the Second Circuit noted in its Summary Order, a Federal Court exercising equitable powers must focus on the three factors espoused in Milliken v. Bradley, 433 U.S. 267, 280-281 (1977), the second factor of which demands that the "equitable decree must be remedial in nature, i.e. it must restore the victims of discriminatory conduct to the position they would have occupied in the absence of such conduct." Exhibit A, quoting Milliken, 433 U.S. at 280-281. In this case, as the Supreme Court has stated before in following the requirement that an exercise of equitable powers by Federal Courts be remedial in nature

> [The] judicial overreaching we see before us today perhaps is the price we now pay for our approval of such extraordinary remedies in the past.... Such extravagant uses of judicial power are at odds with the history and tradition of the equity power and the Framers design.

Jenkins, 115 S.Ct. at 2067 (Thomas, J., concurring). Certainly, the Second Circuit has now approved such

"extraordinary" equitable relief by dramatically changing a local zoning code even though the individual Respondents never claimed to be harmed by the Code.

Furthermore, the remedy must be limited and fashioned, "as all remedies are, to restore the victims of discriminatory conduct to the position they would have occupied in the absence of such conduct." Jenkins, 115 S.Ct. at 2048, quoting Swann v. Charlotte-Mecklenburg Bd. of Ed., 402 U.S. 1, 91 S.Ct. 1267 (1971). Rewriting a local zoning code, as the Federal Courts below have sanctioned in the present case, clearly extends beyond restoring the Respondents to the position they would have occupied in the absence of discrimination. As this Court recently ruled in Lewis v. Casey, "The remedy must of course be limited to the inadequacy that produced the injury-in-fact that the Plaintiff has established." ___ U.S. ___, ___, 116 S.Ct. 2174, 2183 (1996). Yet, the remedy fashioned in the present case has gone far beyond the "injury-in-fact" and fashioned a remedy far overreaching its judicial capacity and disregarding precedent. Respondents here admittedly proved no injury-in-fact so there was therefore no existing wrong to remedy. Therefore, the remedy imposed upon the Petitioner Village exceeds the "well settled principle that the nature and scope of the remedy are to be determined by the violation" and violates appropriate Federal judicial authority because it is aimed at a "condition [the Zoning Code] that does not violate the Constitution [and] does not flow from such a violation." Milliken, 433 U.S. at 281-282. Even the far afield Eleventh Circuit case inapplicably relied upon by the Second Circuit to justify broad equitably powers under the Fair Housing Act, Marable v. Walker, 704 F.2d 1219 (11th Cir. 1983), acknowledges that "[T]he relief must be tailored in each instance to the needs of the particular situation." Id. at 1221. The Airmont Zoning Code is clearly neutral on its

face. In this "particular situation" the Second Circuit predicts a potential "threat" of future discrimination. Yet, the Circuit and District Courts went far beyond tailoring the relief to fit this particular need and trampled over the constitution and this Court's long embraced principles of federalism in their wake. An order enjoining Petitioners from discriminating against Respondents "in the future" would have clearly been the remedy most fittingly tailored to the particular situation of a threatened "future" harm.

The Supreme Court has also recognized that when the Federal Judiciary must interfere with local government, as in the school desegregation cases, as a safeguard and protection of federalism principles and State autonomy, such interference must be of a temporary nature. The goal is to restore control back to the municipality in which it rightly belongs. See, e.g., Jenkins, 115 S.Ct. at 2049. In the present case, the Court below has dictated the sections and language to be included into the Airmont Zoning Code, and thus completely usurped the autonomy and power of the municipality to zone for its public health, safety and general welfare. This takes away the power of the Village to amend its code indefinitely, effectively forever. And, all this has been done despite the fact that there has been no interference with Respondents' exercise of religion by the Petitioners, and certainly not by the Petitioner Village's Zoning Code which is neutral on its face.

Even if the Second Circuit unearthed some "threat" of future discrimination (despite the jury and District Judge's failure to uncover it after a two month trial), "however troubling that [potential discrimination] may be, remedying it is within the District Court's authority only if it is directly caused by the constitutional violation." Jenkins, 115 S.Ct. at 2060 (O'Connor, J., concurring)(internal citation omitted). In the present case there is absolutely nothing in the Village

Zoning Code which precluded home religious worship; and in fact, the Code allows home worship in residential zones and allows for a variance from the two acre lot requirement for a freestanding Synagogue. Therefore the Zoning Code cannot be said to have "directly caused a constitutional violation." See Id. Thus, there has been no "default by the [Village] authorities" to enforce its Zoning Code in a non-discriminatory manner, as is required before a Court may step in and resort to such extraordinary interference. Jenkins, 115 S.Ct. at 2067 (Thomas, J., concurring), citing Swann, 402 U.S. at 16.

Further, even though the Second Circuit suspects a future "threat" of possible discrimination to some unknown individual, not a single party to this suit has been prevented from practicing their religion or injured by the Zoning Code, and such a widespread restructuring remedial order cannot therefore be justified. Lewis, ___ U.S. at ___, 116 S.Ct. at 2183-2184; see also, Dayton Bd. of Ed., 433 U.S. at 417 (1988)(system-wide remedy is beyond Court's scope where more specific and less intrusive remedy is available); Califano v. Yamasaki, 422 U.S. 682, 702 (1979)(scope of relief must be tailored to the specific injury established).

The Second Circuit has here upheld issuance of injunctive relief over the protest by the District Court Judge who presided over the trial and all previous proceedings that no evidence in the record demonstrated a need to remedy any right of Orthodox Jewish residents to pray. Since Federal Court degrees exceed appropriate limits if they are aimed at a eliminating a condition that does not violate the constitution, Pasadena City Board of Education v. Spangler, 427 U.S. 424 (1976); see also, Lewis, supra; Dayton, supra, a fortiori a Federal Court degree exceeds appropriate limits where the condition (e.g. inability to pray) was not even violated. See, Hills v. Gautreux, 425 U.S. 284 (1976).

Whatever violation was found through "appellate alchemy" by the Second Circuit does not obviate the unambiguous fact that no violation of Respondents' right to pray occurred.

Lastly, the zoning code provisions mandated by the lower Courts' remedial orders give a preference to the Orthodox home-Synagogue use. In fact, the Second Circuit sanctioned that this use be given an "as of right" status over and above all other home-office and home-clergy type. Aside from usuriously, and wrongfully, divesting the locality of all autonomy in this regard, it provides an unconstitutional preference for this religion. See, e.g., City of Richmond v. J.R. Croson Co., 488 U.S. 469, 508 & 510 (1989).

As such, there clearly exists no basis for the Second Circuit extraordinary affirmance of a remedy without a wrong.

III.
A DEEP DIVISION EXISTS IN THE CIRCUITS WARRANTING THIS PETITION BEING GRANTED

This ruling by the Second Circuit is in conflict with decisions in other circuits. And, there exists a deep division in the Circuits regarding a municipality's right to zone religious uses.

Beginning in Lakewood v. City of Lakewood, 699 F.2d 303 (5th Cir.), cert. denied, 464 U.S. 815 (1983), the issue of local zoning powers involving First Amendment issues was reviewed by the Circuit Courts. In Lakewood the Sixth Circuit considered a municipal zoning ordinance prohibition of religious places of worship in all residential zoning districts. 699 F.2d at 303-304). The Sixth Circuit remarked that the impact of such zoning ordinances on places of worship created an indirect financial burden on religious

practices. Id. at 307. The Sixth Circuit later observed "[t]he burdens of the ordinance are the increase cost of purchasing land" Id., just as Respondents admitted in the present case. And thus, a direct financial burden to practicing religion as a result of local zoning ordinance was found to be constitutional by the Sixth Circuit.

Contrary to the holding herein by the Second Circuit, in Lakewood the Sixth Circuit expressly noted:

> The Lakewood ordinance "simply regulates a secular activity and, as applied to the appellants operates so as to make the practice of their religious beliefs more expensive." [quoting] 366 U.S. at 605, 81 S.Ct. at 1146. It does not pressure the Congregation to abandoned its religious beliefs through financial or criminal penalties. Neither does the ordinance tax the Congregation's exercise of its religion. Despite the ordinance's financial and aesthetical imposition on the Congregation, we hold that the Congregation's freedom of religion, as protected by the Free Exercise Clause has not been infringed.

Id. at 307-308, citing Braunfield v. Brown, 366 U.S. 599 (1961). Therefore, the Sixth Circuit holding in Lakewood followed established Supreme Court precedent under Braunfield v. Brown, 366 U.S. 599 (1961) rejecting a free

exercise claim where only a financial hardship in religious practices would result from a local zoning ordinance. In so holding, the Sixth Circuit in Lakewood (unlike the Second Circuit herein) did not require any accommodation for religious worship due to financial constraints in a local zoning ordinance regarding purchase of a minimum lot size.

In agreement with the Sixth Circuit ruling in Lakewood, the Eleventh Circuit in Grosz v. City of Miami Beach, 721 F.2d 729 (11th Cir. 1983), cert. denied, 469 U.S. 827 (1984) determined a case on nearly identical facts as the Second Circuit ruling herein. In Grosz, the Eleventh Circuit noted that case "calls for the accommodation of two important values, both embodied in the spirit and letter of the Constitution: Free exercise of religion and the effective use by a state of its police powers. Id. at 730-731. Identical to facts in the instant litigation, Grosz involved an Orthodox Jewish Rabbi who converted a garage area to a place of worship. The local zoning code in Grosz prohibited places of worship in single family residential zones. Also identical to the case at bar, prior to Rabbi Grosz establishing this place of worship, Orthodox Jewish services were conducted in various homes throughout the neighborhood. In Grosz the municipality's zoning ordinance permitted places of worship to operate in other zoning districts than single family residential districts.

The Eleventh Circuit in Grosz found facts similar to the case herein that "well attended (religious) services have disturbed neighbors as a result of persons seeking directions to the Grosz schul, as a result of chanting and singing during the services, and as a result of occasional large congregations of worshippers at the property." Id. at 732. And, contrary to the Second Circuit determination herein, in Grosz the Eleventh Circuit upheld an even more restrictive zoning ordinance despite adverse impact upon the congregation "in

terms of convenience, dollars or aesthetics." Id. at 739. This determination by the Eleventh Circuit followed former Supreme Court Justice Vinson's writing in American Communications Ass'n v. Douds, 339 U.S. 382, 397 (1950), that no free exercise violation existed with a religious group contending "its First Amendment rights were violated by a municipal zoning ordinance preventing the building of churches in certain residential areas." Id. at 740.

Directly contrary to the Sixth and Eleventh Circuit holdings on this issue, the Fifth Circuit in Islamic Center of Mississippi, Inc. v. City of Starkville, 840 F.2d 293 (5th Cir. 1988) determined that a zoning ordinance prohibiting places of worship in residential districts was unconstitutional. The Fifth Circuit declared the zoning ordinance violated the Free Exercise Clause: "[L]aws that make churches, synagogues, and mosques accessible only to those affluent enough to travel by private automobile obviously burden the exercise of religion by the poor." Id. at 299. Thus, the Fifth Circuit followed the ratio decidendi of the Second Circuit on this issue. The Islamic Center Circuit Court expressly noted the Lakewood and Grosz decisions, but explicitly elected not to follow those holdings instead declaring, "The burden placed on relatively impecunious Muslim students by the [the municipal zoning] ordinance" was unconstitutional. Id.

This division in the Circuit Courts highlights the difference in measures a municipality must Constitutionally take in its zoning laws to accommodate religious worship. Both Lakewood and Grosz clearly indicate no accommodation is necessary. The holdings in Islamic Center and by the Second Circuit herein mandates municipal accommodation of religious uses in zoning.

Moreover, the Second Circuit herein specifically cited Justice Souter's concurring opinion in Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, ____ U.S. ____, 113

S.Ct. 2217 (1993). It bears emphasis that in Lukumi Babalu Aye a concurring opinion by Justice Souter advanced the concept of "substantive neutrality that, in addition to demanding a secular object, would generally require local government to accommodate religious differences by exempting religious practices from formally neutral laws." 113 S.Ct at 2241 (Souter, J., concurring). That concurring opinion by Justice Souter in Lukumi Babalu Aye was a direct challenge to the United States Supreme Court's previous holding in Employment Division v. Smith, 494 U.S. 872 (1990). As Justice Souter observed about the Smith decision, "The four Justices who rejected the Smith rule, by contrast, read the Free Exercise Clause as embracing what I have termed substantive neutrality." 113 S.Ct. at 2242.

The Second Circuit decision herein upholding a direction that local zoning codes be fashioned to accommodate religious worship adopts the four Justice dissenting opinion in employment Division v. Smith and the concurring opinion by Justice Souter in Lukumi Babalu Aye. Based upon the Second Circuit's deviation from established precedent and the deep division in the Circuits regarding zoning laws and religious worship, certiorari should be granted herein at least to resolve such issues not resolved in City of Boerne v. Flores, ___ U.S. ___ (1997)(submitted Oct. Term 1996, No. 95-2074).

IV.

CONCLUSION

It is respectfully submitted that the determination by the Second Circuit below is contrary to established precedent and deepens a division in the Circuit Courts on the question of religious worship and zoning ordinances. These issues are of great importance to the public interest and should be considered and resolved by the United States Supreme Court.

Wherefore, we pray that the Writ of Certiorari be issued so that these matters above set forth may be considered and resolved.

Dated: Nyack, New York
March 3, 1997

Respectfully submitted,

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CERTIFICATE OF COUNSEL

STATE OF NEW YORK)
COUNTY OF ROCKLAND)

I certify that I have examined the foregoing Petition for a Writ of Certiorari and that in my opinion it is well-founded and the cause is one in which the Petition should be granted.

DENNIS E.A. LYNCH
Counsel of Record for Petitioners

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

THE SUMMARY ORDER WILL NOT BE PUBLISHED IN THE FEDERAL REPORTER AND MAY NOT BE CITED AS PRECEDENTIAL AUTHORITY TO THIS OR ANY OTHER COURT, BUT MAY BE CALLED TO THE ATTENTION OF THIS OR ANY OTHER COURT IN A SUBSEQUENT STAGE OF THIS CASE, IN A RELATED CASE, OR IN ANY CASE FOR PURPOSES OF COLLATERAL ESTOPPEL OR RES JUDICATA.

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City and County of New York, on the 6th Day of December, one thousand nine hundred and ninety-six.

PRESENT: HONORABLE JAMES L. OAKES,
HONORABLE JOSEPH M. McLAUGHLIN,
HONORABLE JOSE A. CABRANES,
Circuit Judges.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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RABBI YITZCHOK LEBLANC-STERNBERG,
CHANIE LEBLANC-STERNBERG,
FRED WALFISH, LEWIS KAMMAN,
PARK AVENUE SYNAGOGUE, INC.,

Plaintiffs-Appellees,

-against-

No. 96-6149

ROBERT FLETCHER, NICK VERTULLO,
RAYMOND KANE, MAUREEN KENDRICK,
JOHN C. LAYNE, Individually and in their
Capacities as Trustees of the Village of Airmont
and as Officers and Board Members of the
Airmont Civic Assoc., and the VILLAGE
OF AIRMONT,

Defendants-Appellants,

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

-against-

THE VILLAGE OF AIRMONT,
AIRMONT CIVIC ASSOCIATION,
RALPH BRACCO, in his capacity as Mayor
of the Village of Airmont, JOHN C. LAYNE,
RAYMOND KANE, CHARLES CALOTTA,
and RONALD SABO, in their capacities as
Trustees of the Village of Airmont,

Defendants-Appellants.

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FOR APPELLANTS: Dennis Lynch,
Dorfman, Lynch & Knoebel
Nyack, New York

FOR APPELLEES: Sara L. Shudofsky,
Assistant United States Attorney
Southern District of New York
New York, New York

Craig L. Parshall,
Fredricksburg, VA

Appeal from the United States District Court for the Southern District of New York (Goettel, *J.*).

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York and was argued.

ON CONSIDERATION WHEREOF, it is hereby ordered, adjudged, and decreed that the judgment of the district court be and it hereby is AFFIRMED.

The Government filed an action under the Fair Housing Act, 42 U.S.C. § 3601 *et seq.* ("FHA"), in 1991, against the Village of Airmont ("Village"), alleging that the Village was formed for the purpose of excluding Orthodox Jews by, among other things, imposing restrictions on Jewish forms of residential worship. Specifically, the Airmont Civic Association ("ACA"), and organization whose purpose was the incorporation of the Village was to enact a zoning ordinance completely preventing worship in homes -- a primary method of

Orthodox Jewish worship. At roughly the same time, a private group of rabbis initiated an action, which was consolidated with the government case for discovery and trial. The private action was before a jury, while the government action was tried to the court.

After an eight week trial, a jury found that the Village had violated the Plaintiffs' rights under the FHA and the First Amendment. The District Court (Goettel, *J.*) (S.D.N.Y.) Then dismissed the Government action, reasoning that because the Village had only passed the zoning regulations, but had not applied the regulations, there had not yet been a violation of the FHA. The District Court refused to order injunctive relief because: (1) it would be enjoining acts which were already illegal; and (2) "if there is any action taken in the future which violates [the Orthodox Jews'] rights, the United States Government.... will not be timorous about suing." *United States v. Village of Airmont,* 839 F. Supp. 1054, 1064-65 (S.D.N.Y. 1993) (Airmont I), *rev'd and remanded* 67 F.3d 412 (2d Cir. 1995), *cert. Denied,* 116 S. Ct. 2546 (1996). The District Court then granted the Village's motion for judgment as a matter of law in the private action, and set aside the jury verdict.

In September, 1995, this Court reversed, *see Leblanc-Sternberg v. Fletcher,* 67 F.3d 412, 431 (2d Cir. 1995) *(Airmont II), cert. Denied,* 116 S. Ct. 2546 (1996), reasoning that the evidence supported the jury's determination that the Village had violated the FHA. This Court held that there evidence that the events leading to the incorporation of the town and the implementation of its zoning code "amply support a finding that the impetus was not a legitimate nondiscriminatory reason but rather an animosity toward

Orthodox Jews as a group." *Airmont II*, 67 F. 3d at 431. The Court also held that there was support for the jury's finding that the motivation behind the enactment of the zoning regulations was anti-Semitism, and its "implicit finding that Airmont's zoning code *would be* interpreted to restrict the use of home synagogues. *Id.*(emphasis supplied).

This Court held that the District Court erred in concluding that injunctive relief was not proper, because the FHA explicitly provides that courts enter injunctive relief against parties who have violated the FHA "as is necessary to assure the full enjoyment of the rights granted by the [FHA]." *Airmont II*, 67 F.3d at 434. This Court held that "[t]he view that such relief was premature because Airmont had not yet actually applied its zoning provision invidiously was a misapplication of the [FHA]." *Id.* At 434-35. The Court then directed on remand, that the district court "fashion appropriate equitable remedies." *Id.*

> On remand, Judge Goettel ordered:
> A prohibitory injunction, enjoining the Village from: (1) promoting religious discrimination; (2) denying equal protection to religions by use, interpretation, or enforcement of the zoning code; and (3) discriminating in housing based in housing based on religion, or interfering with the exercise of religion through housing.
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> A mandatory injunction, requiring the Village to revise its zoning code so that it could not be construed to prevent home worship, or to prevent persons from walking to and from places of religious worship. The Court specifically called for

> an addition to the zoning code entitled "Residential Place of Worship." Such places were defined as "area[s] located within a residence that is used for the conducting of religious services." The order provided that such places "will be permitted by right on any day in all residential zones."
>
> The retention of documents and notification provisions. The Village was ordered to keep all documents related to zoning decisions, notify the Government of any such decisions, or of any meetings of planning or zoning boards at which applications touching on religious worship will be presented.

LeBlanc-Steinberg v. Fletcher, 922 F. Supp. 959, 964-65 n.15 (S.D.N.Y. 1996) (*Airmont III*).

We review a District Court's award of equitable and injunctive relief or abuse of discretion or a clear error of law. *See EEOC v. Johnson & Higgins, Inc.*, 91 F.3d 1529, 1542 (2d Cir. 1996).

The Village argues that the mandatory injunction conflicts with *Milliken v. Bradley*, 433 U.S. 267 (1977) in three respects: (1) the injunction is disproportionate because there is "no existing violation by [the Village]," rather "it was what the Village of Airmont will 'predictably' do that the Second Circuit found improper in its appellate crystal ball;" (2) the injunction is not remedial' and (3) the District Court usurped the role of the local government by creating a new set of zoning regulations, thereby violating well-settled principles of federalism. The Village is wrong.

In *Milliken v. Bradley,* 433 U.S. 267, 280-281 (1977), the Supreme Court noted that a Federal Court exercising its equitable power must focus on three factors: (1) the decree must be remedial in nature, i.e. it must "restore the victims of discriminatory conduct to the position they would have occupied in the absence of such conduct;" and (3) the Federal Courts must respect the role of state and local authorities in the management of their affairs.

Though by no means unlimited, the power of the Federal Courts to remedy constitutional violations is broad and flexible. *See United States v. Yonkers Bd. Of Educ.,* 837 F.2d 1181, 1235 (2d Cir. 1987). In general, the power to intrude into municipal functions should be exercised only where there has been a constitutional violation. *Id.* The Court should tailor its remedy to fit the nature and extent of the violation. *See Milliken v. Bradley,* 418 U.S. 717, 738 (1974); *Swann v. Charlotte-Mecklenburg Bd. of Educ.,* 402 U.S. 1, 16 (1971). "The Supreme Court has not required that the 'least restrictive means of implementation' be adopted but has 'recognized that the choice of remedies to redress racial discrimination is 'a balancing process left, within appropriate constitutional or statutory limits, to the sound discretion of the trial court. *Yonkers,* 837 F.2d at 1236 (quoting *United States v. Paradise,* 480 U.S. 149, 184 (1987) (quoting *Fullilove v. Klutznick,* 448 U.S. 448, 508 (1980) (Powell, J. concurring) (*quoting Franks v. Bowman Trans. Co.,* 424 U.S. 747, 794 (1976) (Powell, J., concurring in part and dissenting in part). The District Court has "first-hand experience with the parties and is best qualified to deal with the 'flinty, intractable realities of day-to-day implementation of constitutional commands,' "and must be

given great flexibility and broad discretion in choosing a remedy best suited to curing the violation. *Paradise,* 480 U.S. at 184 (quoting *Swann,* 402 U.S. at 6). In determining whether [an] order was "narrowly tailored," the court must "acknowledge the respect owed a District Judge's judgment that specified relief is essential to cure [a Constitutional] violation." *Yonkers,* 837 F.2d at 1236 (quoting *Louisiana v. United States,* 380 U.S. 145, 154 (1965).

A district court has "'not merely the power but the duty to render a decree which will so far as possible eliminate the discriminatory effects of the past as well as bar like discrimination in the future.'" *Id; see also Swann,* 402 U.S. at 15 (scope of a district court's equitable powers to remedy past wrongs is broad). Equitable relief under the FHA may "be structured to achieve the twin goals of insuring that the Act is not violated in the future and removing any lingering effects of past discrimination." *Marable v. Walker,* 704 F.2d 1219, 1221 (11th Cir. 1983). In the past, this and other circuits have allowed Federal District Courts to make changes to, and even strike whole portions of, statutory codes to cure constitutional violations by local municipalities ad ensure that the municipality did not violate the Constitution in the future. *See, e.g., United States v. City of Parma,* 661 F.2d 562, 578 (6th Cir. 1981)., *cert. denied,* 456 U.S. 926 (1982). We have, ourselves, specifically ordered the rezoning of a municipality to ensure compliance with Constitutional mandates. *See Huntington Branch, NAACP v. Town of Huntington,* 844 F.2d 926, *aff'd,* 488 U.S. 15(1988).

1. *Commensurate Remedy.* The Village asserts that there was no existing violation of the FHA, and the only violations were those found in the Second Circuit's "crystal ball."

However, this court previously held that the Village had violated the FHA by passing a zoning code based on religious animus, and found it "predictable from the evidence in this record" that the Village would violate the Constitution by enforcing the code in the future in a discriminatory manner. *Airmont II, 67 F.3d at 434.* This was an egregious constitutional violation, calling for a commensurate injunctive remedy. The District Court needed to fashion a remedy that both cured the past constitutional violation and obviated the threat of future constitutional violations. The District Court therefore issued a prohibitory injunction and a mandatory, forward-looking injunction.

The prohibitory injunction served to cure past constitutional violations by forbidding a repetition of the Village's past discriminatory practices. Judge Goettel was clearly within his discretion when he ordered the Village to cease promoting religious discrimination, denying equal opportunity to religions by use, interpretation, or enforcement of the zoning code in a way to prevent home worship, and from discriminating in housing due to religion, or interfering with the exercise of religion through housing. Such actions are exactly those which the FHA intended to curtail.

Judge Goettel was also clearly within his discretion in ordering forward-looking mandatory injunctive relief against "likely" constitutional violations. The affirmative injunction, requiring the Village to revise its zoning ordinance so that it could not be construed to prevent home worship and to add provisions to protect "Residential Place[s] of Worship," was necessary to ensure that the Village permits the use of residential dwellings for worship.

2. *Remedial in Nature.* Judge Goettel ordered mandatory injunctive relief grudgingly, arguing that in doing so he was forced to ignore the Supreme Court's recent instruction that injunctive relief in such cases be remedial in nature. Judge Goettel felt that affirmative relief did not improve any rights already exercised by Orthodox Jews in Airmont, but "simply [was] insurance that there can be no challenges to their exercise of religion in their homes in the future," and therefore was not truly "remedial." *Airmont III*, 922 F. Supp. at 964 n.15. Generally, a remedial measure is one that places the parties in a position they would have occupied but for the constitutional violation. *Missouri v. Jenkins*, 115 S. Ct. 2038, 2048 (1995). However, that a measure is prospective, because it deters future constitutional violations, does not imply that it is not remedial. In certain instances, prospective injunctions are essential to ensure compliance with constitutional and statutory mandates in the future. *Ct. Alabama-Tombigbee Rivers Coalition v. Department of Interior*, 26 F.2d 1103, 1107 (11th Cir. 1994).

Here, the injunction ensured that rights to free exercise of religion were unencumbered, and the constant threat of limitation of those rights was lifted. This forward-looking aspect of the injunction only requires that the Village do that which the FHA and the Constitutioon already requires. *See Marable*, 704 F.2d at 1221 (FHA injunction may be structured to ensure FHA not violated in future and to remove effects of past discrimination). In that regard, it placed the parties in a position which ensured that their constitutional rights remained inviolate.

3. *Federalism.* There is, of course, always a federalism concern when the federal court steps in to remedy some

municipal problem. This court has cautioned that federal courts should not encroach on a state's ability to remedy constitutional deficiencies, should not use a "sledgehammer where a more delicate instrument will suffice," and should not "move too quickly where it appears that the state ... will in its own way adopt reforms bringing its system into compliance with the Constitution." *Dean v. Coughlin*, 804 F.2d 207, 213 (2d Cir. 1986). Here, there was no indication that the Village was going to make the changes necessary to guarantee that no constitutional violations occurred in the future. Indeed, this Court ruled that future violations were "likely." Given the Village's history and its disregard of this Court's clear holding that it was in violation of the FHA, this injunction was necessary to ensure that the Village complied with the mandate of the FHA.

We have considered all of the arguments raised by the Village, and find them to be without merit.

Accordingly, the judgment of the district court is AFFIRMED.

S/
HON. JAMES L. OAKES,

S/
HON. JOSEPH M. McLAUGLIN,

S/
HON. JOSE A. CABRANES,
Circuit Judges.

Filed: December 6, 1996
U.S. Court of Appeals, Second Circuit
George Lange III, Clerk

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA,
Plaintiff,

-against-

THE VILLAGE OF AIRMONT, AIRMONT CIVIC ASSOCIATION, RALPH BRACCO in his capacity as Mayor of the Village of Airmont, JOHN C. LAYNE, RAYMOND KANE, CHARLES CALOTTA and RONALD SABO, in their capacities as Turstees of the Village of Airmont,
Defendants.

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ORDER
and
JUDGMENT
91 Civ. 8453 (GLG)

This action having been remanded by the Court of Appeals for the entry of declaratory and injunctive relief as against the Village of Airmont, (the Airmont Civic Association having defaulted at the outset of the action), it is ORDERED that:

(1) The Defendant Village of Airmont has violated the Fair Housing Act by enacting its Zoning Code.

(2) The Court enjoins the Defendant, Village of Airmont and its officers, employees, agents, successors, and assigns, as appropriate and all those acting in concert

or participation with them, from:

(a) engaging in any conduct having the purpose or effect of perpetuating or promoting religious discrimination or of denying or abridging the right of any person to equal opportunity on account of religion, including, but not limited to, interpreting the Home Professional Office provision of the Airmont Zoning Code, or any other provision of the Airmont Zoning Code, so as to hinder, prevent, or prohibit persons from assembling in residential dwellings for the purposes of group prayer;

(b) discriminating against any person or group or persons on account of religion in connection with the planning, development, construction, acquisition, financing, operation or approval of any housing in the Village of Airmont;

(c) interfering with any person in the exercise of his right to secure equal housing opportunity for himself or for others; and

(d) taking any action which in any way denies or makes unavailable housing to persons on the basis of religion.

(3) The Village and its officials shall make the following revisions, modifications, deletions, and additions to the Village of Airmont Zoning Code, and

take other affirmative steps as set forth below:

(a) The following paragraph will be added to Article I, Section 3 ("Purposes") of the Airmont Zoning Code;

> G. Nothing in the Zoning Code of the Village of Airmont, New York shall be construed or interpreted in any manner whatsoever so as to hinder, prevent or prohibit individuals from peacefully assembling in residential dwellings solely for the purposes of individual or group prayer.

(b) The following paragraph will be added to Section 2 of Article XVIII ("Definitions"):

> *Residential Place of Worship* - An area located within a residence that is used for the conducting of religious services. It is the intent of this Local Law that the presence of pedestrians walking to and from religious services at a Residential Place of Worship shall not in and of itself constitute a change in the residential character of the neighborhood.

(c) The Residential Place of Worship will be permitted by right on any day in all residential zones. The use would be listed in Article III as Section 5.4 (A) (5) with respect to the R-35 zone.

(d) The term "Place of Worship," defined in Section 2 of Article XVIII ("Definitions"), will be deleted and the term "Free-Standing Place of Worship" substituted in its place throughout the Local Law, and the following will be added to the definition: "except that a portion of the building or structure may be dedicated as living quarters for clergy and their families."

(e) Neighborhood Place of Worship will be defined in Section 2 of Article XVIII ("Definitions") as follows: a building or structure on a lot of at least 20,000 square feet that is used exclusively for the conducting of organized religious services.

(f) The Neighbohood Place of Worship will be permitted in all residential zones, not just the R-15 zone.

(g) In Section 2 of Article XVIII, the last two sentences of the definition of "Home Professional Office" will be deleted.

(4) The following additional affirmative relief shall be ordered:

(a) For a period of five years, the Village and its officials will notify, in advance, counsel for the United States of all meetings of the Village Planning Board and Village Zoning Board and Village Zoning Board of Appeals in which any application relating to religious worship will be

considered, and will provide copies of the agendas of those meetings to counsel for the United States in advance of the meetings.

(b) For a period of five years, the Village and its officials will report to the United States, through counsel, of any proposed changes in the Village's zoning ordinances relating to religious worship, other than those set forth above.

(c) After five years, the Defendant may move the Court to terminate this provision of the order.

So Ordered.

Dated: April 25, 1996
White Plains, New York

Gerard L. Goettel
U.S.D.J.

Filed: April 29, 1996
U.S. District Court
S.D. of N.Y.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA,

Plaintiff,

-against-

ORDER
91 Civ. 8453
(GLG)

THE VILLAGE OF AIRMONT,
AIRMONT CIVIC ASSOCIATION,
RALPH BRACCO, in his capacity as
Mayor of the Village of Airmont,
JOHN C. LAYNE, RAYMOND
KANE, CHARLES CALOTTA
and RONALD SABO,in their capacities
as Trustees of the Village of Airmont,

Defendants.

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The Government has submitted a delayed response to this Court's inquiry of April 12, 1996 stating that it was not received until April 24, 1996.

While we have some difficulty in understanding the Government's letter of April 26, 1996, it would appear to be a concession that, despite the changes made at the government's request in the Airmont Zoning Code, there would not be an absolute right to operate a residential house of worship and that therefore there will be situations requiring applications to be made to the Village. That being so we will amend the order already issued in this case to add as a final provision:

4. (d) The Village and its officials shall maintain all applications by any residents of the Village of Airmont to

the Village Planning Board and to the Village Zoning Board of Appeals for residential houses of worship, and the disposition of those applications. The Defendants shall make these applications and dispositions available to the United States for inspection and copying upon reasonable notice.

So Ordered

Dated: April 29, 1996
White Plains, New York

S/
Gerard L. Goettel
U.S.D.J.